
THE UHF DISCOUNT AND THE NATIONAL TELEVISION OWNERSHIP RULE:

“THIS I TELL YOU, BROTHER: YOU CAN’T CHANGE ONE WITHOUT THE OTHER”¹

By Bill Durdach*

I. INTRODUCTION

Today’s debate over ownership of our nation’s broadcast airwaves is decades old.² Since its inception, the Federal Communications Commission (“FCC” or “Commission”) has attempted to create a consumer-oriented media marketplace by promoting competition, localism, and diversity.³ Fearing that media consolidation would undercut these goals, the Commission instituted rules to regulate the ownership of radio and television broadcast stations as well as newspapers.⁴ These rules include the Newspaper/Broadcast Cross-Ownership rule,⁵ the Dual Television Network Ownership rule,⁶ the Local TV

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¹ Cole Porter, Sammy Cahn, James van Heusen, *Frank Sinatra Lyrics “Love and Marriage,”* AZLYRICS.COM, <http://bit.ly/1wGu9o4> (last visited Nov. 5, 2014).

² See *FCC’s Review of the Broadcast Ownership Rules*, FCC, <http://fcc.us/1vwjzls> (last visited Nov. 02, 2014).

³ See *id.*

⁴ *Id.*

⁵ See *id.*

Beginning in 1975, FCC rules banned cross-ownership by a single entity of a daily newspaper and television or radio broadcast station operating in the same local “market.” Under the 2007 revised rule, the FCC evaluates a proposed cross-ownership combination on a case-by-case basis to determine whether it would be in the public interest – specifically, whether it would promote competition, localism and diversity.

Id.

⁶ See *id.* (“The Dual Television Network Ownership rule prohibits a merger among any two or more of these television networks: ABC, CBS, Fox, and NBC.”).

Multiple Ownership rule,⁷ the Local Radio/TV Cross-Ownership rule,⁸ the Local Radio Ownership rule,⁹ and, most relevant to this Comment, the National Television Ownership rule.¹⁰

The objective of the National Television Ownership Rule is to prevent the consolidation of broadcast licenses in a few parties by limiting the number of stations a single entity may possess.¹¹ The number of stations a company is permitted to hold has increased incrementally over time. The current statute specifies that an entity cannot have interest in a number of stations whose collective reach surpasses more than 39% of all U.S. TV households.¹²

To understand the Commission's concern over media consolidation, it is important to consider the unique challenges broadcasters faced during their early years. At the advent of television broadcasting over seventy years ago, prospective broadcasters rushed to acquire licenses in the two bands of spec-

⁷ *See id.*

The Local TV Multiple Ownership rule allows an entity to own up to two TV stations in the same DMA if either (1) the service areas – known as “Grade B signal contours” – of the stations do not overlap; or (2) at least one of the stations is not ranked among the top four stations in the DMA (based on market share), and at least eight independently owned TV stations would remain in the market after the proposed combination.

Id.

⁸ *See id.*

The rule imposes restrictions based on a sliding scale that varies by the size of the market: (1) in markets with at least 20 independently owned “media voices” (defined as full power TV stations and radio stations, major newspapers, and the cable system in the market) an entity can own up to two TV stations and six radio stations (or one TV station and seven radio stations); (2) in markets with at least ten independently owned “media voices” an entity can own up to two TV stations and four radio stations; and (3) in the smallest markets an entity may own two TV stations and one radio station. In all markets, an entity must comply with the local radio and local TV ownership limits.

Id.

⁹ *See id.*

The rule imposes restrictions based on a sliding scale that varies by the size of the market: (1) in a radio market with 45 or more stations, an entity may own up to eight radio stations, no more than five of which may be in the same service (AM or FM); (2) in a radio market with between 30 and 44 radio stations, an entity may own up to seven radio stations, no more than four of which may be in the same service; (3) in a radio market hosting between 15 and 29 radio stations, an entity may own up to six radio stations, no more than four of which may be in the same service; and (4) in a radio market with 14 or fewer radio stations, an entity may own up to five radio stations, no more than three of which may be in the same service, as long as the entity does not own more than 50 percent of all radio stations in that market.

Id.

¹⁰ *Id.*

¹¹ *Id.*

¹² Consolidated Appropriations Act of 2004, Pub. L. No. 108–199, § 629, 118 Stat. 99–100.

trum suitable for broadcast analog television signals: VHF – Very High Frequency (Channels 2-13) and UHF – Ultra High Frequency (Channels 14-83).¹³

However, in the “analog era,” these bands were not equal.¹⁴ UHF signals were weaker and seen as undesirable when compared to their counterpart VHF signals.¹⁵ On the other hand, VHF signals were more powerful and had far better propagation characteristics that allowed broadcasters to reach a larger population with a clearer signal.¹⁶ VHF spectrum was limited however, since only a few stations could operate in a given market free of interference.¹⁷ This ultimately left many areas and populations underserved.¹⁸

This scarcity of VHF spectrum forced the Commission to turn to the development of the UHF band.¹⁹ While most major networks settled in on the desirable VHF spectrum very early on, UHF spectrum presented the Commission with the opportunity to increase the number of stations available to the public.²⁰ However, launching a broadcast station at the time, let alone a station using weaker UHF signals, was a difficult, expensive, and risky proposition.²¹ Even with the prospect of putting more licenses in fewer hands, the Commission decided to turn the task of developing the band to existing broadcasters who already had the experience and capital necessary to operate UHF stations.²²

As a result, the Commission relaxed the National Television Ownership rule so experienced broadcasters could begin to operate stations in the underused UHF band.²³ For example, in 1941, an entity could not own more than three

¹³ Cecilia Rothenberger, Comment, *The UHF Discount: Shortchanging the Public Interest*, 53 AM. U. L. REV. 689, 691, 696-697 (2004).

¹⁴ See *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, MB Docket No. 13-236, 28 FCC Rcd 14324 para. 19 (Sept. 26, 2013) [hereinafter *UHF Discount Elimination NPRM*].

¹⁵ *Id.* para. 1.

¹⁶ *Id.* paras. 14, 19.

¹⁷ See Broadcast Services Other than Standard Broadcast, 6 Fed. Reg. 2282, 2284-2285 (May 6, 1941) (referring to the national ownership limit of three television stations).

¹⁸ See Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1581 (1962) (“[I]n order to prevent interference of one with another there could be permitted only one or two VHF stations in many cities”).

¹⁹ See *id.* (“UHF would be employed in those areas where it would be the only service or would be essential to provide a choice of service.”).

²⁰ See Rothenberger, *supra* note 13, at 697.

²¹ See *id.*

²² See *In the Matter of Amendment of Section 3.636 of the Commission's Rules & Regulations Relating to Multiple Ownership of Television Broad. Stations*, Report and Order, Docket No. 10822 43 FCC 2797, paras. 3-6 (1954) [hereinafter *Multiple TV Broadcast Ownership Order*].

²³ See Rothenberger, *supra* note 13, at 704, 705-706.

stations.²⁴ By 1954, this number was increased to seven with a limit of operating five VHF stations, which would leave two stations open for UHF expansion.²⁵ The National Television Ownership Rule continued to loosen in 1985 when the Commission decided a broadcast entity could have interest in any number of stations as long as their collective reach did not surpass more than 25% of U.S. TV households.²⁶

As part of its decision to raise the cap to 25%, the Commission also created the UHF Discount.²⁷ The Discount mandated that a UHF station's reach would only count for half towards the national ownership cap of 25%.²⁸ For example, in the large Los Angeles market, a UHF station would only count 2.46% towards the cap while a VHF station would count for 4.92%.²⁹ By deciding to only count half of a UHF station's population towards the National Television Ownership Rule, the Commission's UHF Discount allowed broadcast owners to significantly expand the number of stations they had interest in without exceeding the designated limit.³⁰ Due to this increased scale, experienced broadcasters were able to invest in technologies that led to the increased proliferation of the UHF band that the Commission had always desired and had deemed necessary to further their goals.³¹

However, times have changed significantly. Over the past two decades, UHF signals have greatly increased in popularity due to technological advancements, most notably, the digital transition³² in 2009.³³ As a result, policies

²⁴ Broadcast Services Other than Standard Broadcast, 6 Fed. Reg. 2282, 2285 (May 6, 1941).

²⁵ *Multiple TV Broadcast Ownership Order* 43 FCC 2797, para. 3 (1954).

²⁶ *In the Matter of Amendment of Section 73.3555 (Formerly Sections 73.35, 73.240 & 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM & Television Broadcast Stations*, Memorandum Opinion and Order, FCC 84-638, GN Docket No. 83-1009 100 FCC.2d, 74, 76 (Feb. 1, 1985) [hereinafter *1985 Multiple Broadcast Ownership Order*].

²⁷ See Rothenberger, *supra* note 13, at 704-706.

²⁸ See Rothenberger, *supra* note 13, at 706.

²⁹ Joe Flint, *FCC Proposes Eliminating UHF Discount from TV Ownership Rules*, LOS ANGELES TIMES (Sept. 26, 2013), <http://lat.ms/1GqVf6W>.

³⁰ *Id.*

³¹ See Rothenberger, *supra* note 13, at 706-707.

³² *Digital Television*, FCC, <http://fcc.us/1znurCB> (last visited Nov. 10, 2014)

Digital Television (DTV) is an advanced broadcasting technology that has transformed the television viewing experience. DTV enables broadcasters to offer television with better picture and sound quality, and multiple channels of programming. Since June 13, 2009, full-power television stations nationwide have been required to broadcast exclusively in a digital format...The switch from analog to digital broadcast television is known as the Digital Television Transition. In 1996, Congress authorized the distribution of an additional broadcast channel to every full-power TV station so that each station could launch a digital broadcast channel while simultaneously continuing analog broadcasting. Later, Congress set June 12, 2009 as the deadline for full power televi-

instituted by the Commission to loosen the ownership of UHF spectrum appear outdated and calls have been made to rescind the UHF Discount.³⁴

On September 26, 2013, the Commission responded to this criticism by initiating a rule to end the UHF Discount.³⁵ With a 2-1 vote in favor,³⁶ the Commission released a Notice of Proposed Rulemaking that ends the Discount, but notably, does not raise the current cap.³⁷ The new rule will cause a significant tightening of the National Television Ownership Rule.³⁸ As a result, many broadcast owners who relied upon the Discount will now be either over the 39% cap or close to it.³⁹ This will negatively affect broadcasters' business plans and will likely result in the forced divestiture of stations. Citing these concerns, many in the industry have criticized the decision to repeal the UHF Discount without a review of the National Television Ownership Rule.⁴⁰ The National Association of Broadcasters has stated that a repeal of the discount without the accompanying review would be struck down in court as "arbitrary and capricious" under the Administrative Procedure Act since it inadvertently low-

sion stations to stop broadcasting analog signals...An important benefit of the switch to all-digital broadcasting is that parts of the valuable broadcast spectrum have been freed up for public safety communications by groups such as police, fire departments and rescue squads. Also, some of the spectrum has been auctioned to companies that will be able to provide consumers with advanced wireless services, such as wireless broadband.

Id.

³³ *UHF Discount Elimination NPRM*, *supra* note 14, para. 1; *see In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, ET Docket No. 10-235, para. 42 (2010) [hereinafter *Broadcast Innovation NPRM*].

³⁴ *See* Rothenberger, *supra* note 13, at 706.

³⁵ *See* John Eggerton, *FCC Proposes To Eliminate the UHF Discount*, MULTICHANNEL (Sept. 26, 2013, 11:37 AM), <http://bit.ly/1yZGO8P>.

³⁶ The passage of the proposal was led by the two Democrats on the Commission, Chairwoman Mignon Clyburn and Commissioner Jessica Roseworcel. Republican Commissioner Ajit Pai was the dissenting vote. The Commission had two vacancies at the time due to the departure of Democratic Chairman Julius Genachowski and Republican Commissioner Robert McDowell. New FCC Chairman Tom Wheeler, a Democrat, has not taken a strong position on the topic yet. While new Republican Commissioner Michael O'Rielly would likely be a Nay vote for the current proposal based upon his earlier statement that the Commission "should not finalize its proposal to scrap the UHF discount unless it does so as part of an overall review of the ownership rules." *Id.*; *but see* John Eggerton, *O'Rielly To FCC: Don't Put Your Head In the Sand*, MULTICHANNEL (June 19, 2014, 12:45 PM), <http://bit.ly/1sAGrQp>.

³⁷ *See* Eggerton, *supra* note 35.

³⁸ *Id.*

³⁹ *See* Doug Halonen, *FCC Proposes Elimination of UHF Discount*, TVNEWSCHECK (Sept. 26, 2013, 12:43 PM), <http://bit.ly/139r4Cb>.

⁴⁰ *Id.*

ers the cap.⁴¹ Others parties have even argued that the Commission no longer has the authority to alter the National Television Ownership Rule.⁴²

A. Thesis and Organization of Comment

Today, consumers fill their demand for information and entertainment through a variety of platforms.⁴³ An area once dominated by television broadcasters has changed into a market with a variety of competing media sources such as Cable, Satellite, and the World Wide Web. Despite this competition, many regulations that govern the ownership of broadcast stations still exist and make broadcasters less competitive against their unregulated opposition. As a result, the Federal Communications Commission's proposal to repeal the UHF Discount is likely to be found "arbitrary and capricious." Repealing the UHF Discount by itself is a step in the wrong direction and will only further reduce competition. Therefore, the Commission should consider raising the cap created by National Television Ownership rule, or at the very least, should conduct a review of the rule in its entirety before deciding whether to repeal the UHF discount.

This Comment first surveys the intertwined history of the UHF band and the National Television Ownership Rule. Second, it reviews the Commission's attempts to develop the UHF band, which eventually led to the creation of the UHF Discount in 1985. Third, this Comment evaluates the current proposal to eliminate the UHF Discount and details the industry's criticisms. Fourth, the discussion also analyzes the Commission's authority to change the current National Ownership Rule in the wake of the *Prometheus*⁴⁴ decision. Fifth, this Comment considers whether or not eliminating the UHF Discount without revisiting the ownership rules is "arbitrary and capricious" under the Administrative Procedure Act. Sixth, and finally, this Comment concludes by arguing that the Commission still has the authority to change the national cap and should evolve it to reflect the competitive realities of the marketplace. As a result of these concerns over competition, the Commission should not repeal the UHF

⁴¹ John Eggerton, *NAB: Stand-alone UHF Discount Decision Would Be Illegal*, BROADCASTING AND CABLE (Dec. 16, 2013, 4:45 PM), <http://bit.ly/139r4Cb>.

⁴² See *In re* Amendments of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Sinclair Broadcasting Group, Inc.*, MB Docket No. 13-236, at 5-8, (Dec. 16, 2013) (available via FCC Electronic Comment Filing System); see also *In re* Amendments of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Ion Media Networks, Inc.*, MB Docket No. 13-236, at 11-14, (Dec. 16, 2013) (available via FCC Electronic Comment Filing System).

⁴³ See Eggerton, *supra* note 36.

⁴⁴ See generally *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004).

Discount unless it is done in a proceeding to raise the cap, or at the very least, in a way that ensures that the cap is not indirectly lowered by repeal.

II. THE HISTORIC RELATIONSHIP BETWEEN OWNERSHIP AND UHF CHANNELS

The Federal Communications Commission was established by the Communications Act of 1934, with the broad authority to license the airwaves in the “public interest, convenience, and necessity.”⁴⁵ Traditionally, this public interest has been served by fostering the Commission’s three goals of competition, localism, and diversity.⁴⁶ Competition allows for greater innovation and improved service at a benefit for consumers.⁴⁷ Localism may be characterized as the broadcast station’s dedication to serving its community and offering local news as well as public affairs and programming content that addresses issues that are relevant to the viewers in that area.⁴⁸ Finally, the Commission considers diversity in five categories: “viewpoint diversity, outlet diversity, program diversity, source diversity, and minority and female ownership diversity.”⁴⁹ With these three goals in mind, the Commission set out to create a broadcast television market that best serves the public interest. However, the Commission would soon realize the difficulty of creating such a market.

A. Seeking the Untapped Potential of UHF Stations

In the 1940s, the Commission faced a rush of applications for broadcast licenses.⁵⁰ In 1945, Congress statutorily mandated that the Commission issue licenses for television stations that would serve the public.⁵¹ The result was a table allocating VHF channels to the largest 140 markets.⁵² The initial release of licenses caused a flood of applications, which forced the Commission to

⁴⁵ Telecommunications Act, 47 U.S.C. § 307(a) (2012).

⁴⁶ Kristen Morse, *Relaxing the Rules of Media Ownership: Localism and Competition and Diversity, Oh My! The Frightening Road of Deregulation*, 24 J. NAT’L ASS’N ADMIN. L. JUDGES 351, 361 (2004) (citing to 2002 Biennial Regulatory Review, 68 Fed. Reg. 46286 (Aug. 5, 2003)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *The Darkened Channels: UHF Television and the FCC*, *Supra* note 18, at 1579; *See generally* Rothenberger, *supra* note 13 (a very helpful secondary source when researching FCC orders during the early history of broadcast television and the beginning of UHF band development).

⁵¹ *The Darkened Channels: UHF Television and the FCC*, *Supra* note 18, at 1578-79.

⁵² *Id.*

institute a freeze in 1948.⁵³ It was not until 1952 that the Commission again began licensing stations by market.⁵⁴ In its Sixth Report and Order, the agency's stated priorities were:

1. To provide at least one television service to all parts of the United States. 2. To provide each community with at least one television broadcast station. 3. To provide a choice of at least two television services to all parts of the United States. 4. To provide each community with at least two television broadcast stations. 5. Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.⁵⁵

However, by 1952, the VHF band became saturated since only a few VHF stations could air simultaneously in a market without interference.⁵⁶ In order to further competition, localism, and diversity, the Commission decided to open up the UHF band for licensing.⁵⁷ One of the most noteworthy decisions in the Order was to allow the use of both VHF and UHF signals in the same market, a policy called intermixture.⁵⁸ This decision was harshly criticized by players in the broadcast industry because of their concerns that the weaker UHF stations⁵⁹ would not be able to compete against VHF stations.⁶⁰ CBS argued the UHF signal's uncertainty would discourage the construction of UHF stations, and instead recommended that only UHF signals be used when an adequate number of VHF stations cannot be allocated.⁶¹ The fourth network at the time, DuMont,⁶² also voiced concerns that because of technical and economic issues

⁵³ *Id.* at 1579.

⁵⁴ *See In the Matter of Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, Docket No. 8736 and 8975, para. 1 (Apr. 11, 1952); *The Darkened Channels: UHF Television and the FCC*, *supra* note 18, 1579-80.

⁵⁵ *In the Matter of Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, Docket No. 8736 and 8975, para. 63 (Apr. 11, 1952).

⁵⁶ *See The Darkened Channels: UHF Television and the FCC*, *supra* note 18, at 1580.

⁵⁷ *Id.* at 1579-80.

⁵⁸ *See id.* at 1579.

⁵⁹ *See In the Matter of Improvements to UHF Television Reception*, Notice of Inquiry, GEN Docket No. 78-391, 70 F.C.C.2d 1162, para. 8 (Dec. 20, 1978) [hereinafter *Improvements to UHF Reception NOI*].

Due to the physical characteristics of wave propagation as a function of frequency, UHF signal strength declines more rapidly with distance than does VHF signal strength. In addition, terrain variations and high buildings are more likely to affect the higher frequency UHF signals ... The UHF disadvantage is still evident today when rating comparisons are made between UHF and VHF stations—even between UHF and VHF network affiliates where the programming differences are minimal.

Id.

⁶⁰ *The Darkened Channels: UHF Television and the FCC*, *supra* note 18, at 1579-80.

⁶¹ *Id.* at 1580.

⁶² DuMont was an early rival of the big three networks (ABC, CBS, and NBC) that began operations in 1946 and dissolved in 1956. The lack of VHF stations in important

such as advertising, UHF stations could not be profitable for the owners.⁶³

Due to the increased demand for more broadcast television stations,⁶⁴ the number of UHF television stations significantly increased from 45 in 1953, to 137 by 1954.⁶⁵ By 1955, however, this number fell to 108 stations.⁶⁶ UHF stations struggled to reach a significant percentage of consumers, evidenced by the fact that only “8.35% of the 3.3 million receivers produced in the first half of that year were equipped to receive all channels.”⁶⁷ Furthermore, the issues UHF stations faced were not just technical, but economic as well.⁶⁸ Since UHF stations reached smaller audiences, “advertisers and networks preferred VHF.”⁶⁹ Lacking steady revenue from advertisers and network programming, stations could neither invest in their facilities and equipment nor convince consumers to purchase UHF receivers. This left many UHF stations simply unprofitable,⁷⁰ and by 1962, only 104 stations nationwide remained in business.⁷¹

B. The All Channel Receiver Act of 1962

In 1962, at the behest of the Kennedy Administration’s directive to reinvigorate television,⁷² outspoken FCC Chairman Newton Minow began to push for a stronger UHF band at the Commission.⁷³ Arguably, Minow’s greatest accom-

markets and its dependence on UHF signals were seen as the leading causes for its downfall. *See generally* GARY NEWTON HESS, A HISTORICAL STUDY OF THE DU MONT TELEVISION NETWORK 168-169 (Andrew Hicks ed., 1979) (originally published by Hess in 1960 as a doctoral dissertation).

⁶³ *The Darkened Channels: UHF Television and the FCC*, *supra* note 18, at 1580.

⁶⁴ *Id.* at 1579. With a very saturated VHF band, the Commission hoped the UHF band would produce more television options for consumers. *Id.*

⁶⁵ *Improvements to UHF Reception NOI*, *supra* note 59, para. 9.

⁶⁶ *Id.* at para. 9.

⁶⁷ *Id.* at paras. 9, 11.

⁶⁸ *See id.* at paras. 9, 11.

⁶⁹ *Id.* at para. 8.

⁷⁰ *Id.* at para. 8.

⁷¹ *Id.* at para. 9.

⁷² JOSEPH M. SIRACUSA, PRESIDENTIAL PROFILES: THE KENNEDY YEARS 333 (Facts on File, Inc., 2004). President Kennedy praised Chairman Minow’s work. Siracusa notes;

In a strongly worded address to the National Association of Broadcasters in May 1961, Minow surprised his audience by condemning television as a “vast wasteland” of western bad-men, private eyes, cartoons, and “endless commercials.” He accused broadcasters of an excessive dependence upon TV program ratings, which “don’t tell us what the public might watch if they were offered half a dozen additional choices.”

Id.

⁷³ *Id.* at 334 (Facts on File, Inc., 2004). Chairman Minow optimistically pushed for greater use of the UHF band stating, “UHF will change the face and voice of television in the present decade.” *Id.*

plishment was the All Channel Receiver Act of 1962.⁷⁴ The Act required that all receivers manufactured after 1964 be capable of receiving UHF signals.⁷⁵ The Commission later passed mandates to ensure that UHF signals could be tuned easily, thus overcoming another technical issue.⁷⁶ As a result, by 1967, 42.1% of the nation's households had all-channel receivers.⁷⁷ By 1976, that number had grown to 92%.⁷⁸

However, after many UHF stations continued to struggle financially in the mid-1970s, the Commission reviewed the state of the television market and found that UHF still lagged far behind VHF signals.⁷⁹ The study found that receiver antennas were still a “weak link” for UHF stations.⁸⁰ It further stated that due to the inherent physical limitations of the UHF band, the band would likely never be equivalent to the superior VHF band.⁸¹

C. Increasing the National Television Ownership Rule to Benefit Consumers

In addition to initiatives to ameliorate the UHF band's technical problems, the Commission also incrementally relaxed the National Television Ownership rule in hope that experienced broadcasters would begin operating in the UHF band.⁸² In 1941, the Commission ruled that a single party cannot own more

⁷⁴ See generally All Channel Receiver Act of 1962, Pub. L. 87-529, 76 Stat. 150-51; see also 47 USC § 303(s) (2012); see also 47 USC § 330 (2012); Douglas W. Webbink, *The Impact of UHF Promotion: The All-Channel Television Receiver Law*, 34 L. AND CONTEMPORARY PROBLEMS 535 (Summer 1969).

⁷⁵ All Channel Receiver Act of 1962, Pub. L. 87-529, 76 Stat. 150-51.

⁷⁶ *Improvements to UHF Reception NOI*, paras. 12-14.

⁷⁷ *Id.* at para. 12.

⁷⁸ *Id.* at para. 13.

⁷⁹ *In the Matter of Improvements to UHF Television Reception* Notice of Inquiry, GEN Docket No. 78-391, 90 FCC 2d 1121, para. 5 (July 22, 1982).

⁸⁰ *Id.*

Superior receiving antenna equipment is available at low cost, the task force found, but unless the public has the knowledge and desire to install it, better equipment will not be utilized. Significant additional attention to changes in television receivers, over which this Commission has some regulatory control, will not eliminate the major difficulty of receiving antenna systems.

Id.

⁸¹ *Id.* By the late 1970's, UHF stations had finally become profitable, though not nearly as profitable as VHF stations. Editorial, *Can Benign Neglect Aid UHF*, 18 BROADCAST MGMT. ENGINEERING 6 (1982), available at <http://bit.ly/1wdZ38J>. The study had found UHF stations' profitability to be comparable to AM and FM radio, which the Commission considered to be in a healthy state. *Id.* In 1980, the percentages of stations turning a profit were almost the same with 58% of UHF stations, 59% AM stations, and 55% of FM stations claiming profitability. *Id.*; see *Multiple Broadcast Ownership Order* 100 FCC 2d 74, para. 43 (Feb. 1, 1985).

⁸² See *In the Matter of Amendment of Sections 3.35, 3.2, 3.240, and 3.636 of the Rules*

than three broadcast stations.⁸³ In 1945, this cap was increased to five stations and was upheld again in 1953.⁸⁴ However, recognizing a need for growth in UHF stations to promote their goals, especially in underserved areas, the Commission expanded the number to seven stations and notably limited owners to five VHF stations in order to encourage them to invest in the UHF band.⁸⁵ By allowing investment by experienced broadcasters, the Commission hoped the UHF band would gain popularity and improve technologically.⁸⁶

D. Using the Percentage of Television Households in the National Television Ownership Rule

In 1984, the Commission proposed increasing the number of stations an entity could own to twelve stations because it believed that consolidation would have no harmful effect on consumers.⁸⁷ However, Petitions of Reconsideration from the industry asked the FCC to add a population aspect to the National Ownership Rule and to consider the weakness of UHF stations.⁸⁸ This reflected the reality that although a UHF station could possess a license in a market, it still could not reach the amount of viewers as a VHF station.⁸⁹

The Commission decided that a limit calculated by both number (twelve stations) and population (25%) would best capture the strength of a broadcast entity.⁹⁰ The Commission argued that it was illogical to allow an entity to acquire several stations in populated areas to reach a larger portion of the public.⁹¹ At the same time, the Commission recognized that it would be wrong to use only

and Regulations Relating to the Multiple Ownership of AM, FM and Television Broad. Stations, Report and Order, Docket No. 8967, 18 FCC 288, para. 15 (Nov. 25, 1953) [hereinafter *AM FM & TV Broadcast Order*].

⁸³ 6 Fed. Reg. 2284, 2285 (May 6, 1941).

⁸⁴ See *AM FM & TV Broadcast Order* 18 FCC 288, paras. 16, 19-20, (Nov. 25, 1953).

⁸⁵ See *In the Matter of Amendment of Section 3.636 of the Commission's Rules & Regulations Relating to Multiple Ownership of Television Broad. Stations*, Report and Order, Docket No. 10822, 43 FCC 2797, paras. 3, 5-6 (Sept. 17, 1954). The 1954 Order hoped that investment into the UHF band by VHF owners would create increase the attractiveness of UHF. *Id.* Owners at the time argued that UHF needed investment by parties "with a know-how, financial and other resources and desire to foster the UHF" and that the promotion that such multiple owners would afford their own UHF stations would markedly increase listener and advertiser acceptance of UHF and would "stir manufacturers of transmitting and receiving equipment (several of whom are multiple owners) to greater development and production of such equipment." *Id.*

⁸⁶ See *id.*

⁸⁷ 1985 *Multiple Broadcast Ownership Order*, *supra* note 26, at para. 2.

⁸⁸ *Id.* at para. 33 (Feb. 1, 1985).

⁸⁹ See *id.* at para. 43.

⁹⁰ See *id.* at para. 38.

⁹¹ See *id.* at paras. 37, 39.

a 25% cap since an entity could hypothetically own a countless number of smaller stations.⁹² Therefore, by utilizing both a numerical and population limit, the Commission could best promote its goal of furthering competition, diversity, and localism.⁹³

III. CREATING THE UHF DISCOUNT

The Commission also answered calls to take into account the weaker UHF signals.⁹⁴ Some parties argued that it was unfair for a UHF station and a VHF station to have the same value when calculating the limit because of the UHF band's inherent signal weaknesses.⁹⁵ In their reconsideration of this issue, the Commission turned to the work of the UHF Comparability Task Force,⁹⁶ who noted UHF's limitations by stating:

Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength.⁹⁷

The petitioners asked for the population limit to be increased when an entity owned UHF stations, but the Commission concluded it would be more effective to take into account a UHF station's coverage limitation.⁹⁸ To do this, the Commission adopted the UHF discount.⁹⁹ The UHF discount held that "with respect to the audience reach limit adopted herein, we believe that owners of UHF stations should be attributed with only 50 percent of a market's theoretical audience reach to account for this disparity."¹⁰⁰ For example, a VHF station in New York City will reach 7.72% of all television households, but with the discount, a UHF station's audience reach would only comprise 3.86%.¹⁰¹ The

⁹² See *id.* at paras. 37, 39.

⁹³ See Morse, *supra* note 46, at 361 (citing to 2002 Biennial Regulatory Review, 68 Fed. Reg. 46286 (Aug. 5, 2003)).

⁹⁴ 1985 Multiple Broadcast Ownership Order, *supra* note 26, at paras. 42-43.

⁹⁵ *Id.* at paras. 12, 43.

⁹⁶ *In the Matter of Improvements to UHF Television Reception*, Report and Order, GN Docket No. 78-391 90 FCC 2d 1121, para. 4 (Aug. 6, 1982) ("Further research was conducted in a variety of areas, but, based on the task force's preliminary assessment, was concentrated on (1) receiving antenna systems, and (2) determining the actual consumer difficulties, as opposed to pure technical difficulties, of the UHF service.").

⁹⁷ 1985 Multiple Broadcast Ownership Order, 100 FCC2.d 74, at para. 43 (Feb. 1, 1985).

⁹⁸ *Id.* at para. 44.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Rothenberger, *supra* note 13, at 706.

Commission noted the discount “properly reflects the Commission’s historical concern with UHF television.”¹⁰²

A. UHF Band Meets Potential

After years of initiatives, the UHF band finally realized the growth the Commission sought for decades. For example, in 1995, the Commission found that the number of UHF stations increased 250% over the past two decades.¹⁰³ Also, UHF stations became profitable with average profits tripling to \$1.5 million between 1991 and 1993.¹⁰⁴ And finally, networks trusted UHF stations enough to partner with and sell their programming to them.¹⁰⁵ The Commission noted that of “Fox’s 140 primary affiliates, 121 (86%) are UHF stations; of United Paramount’s 95 affiliates, 78 (82%) are UHF stations; and of Warner Brothers 43 affiliates, 34 (79%) are UHF stations.”¹⁰⁶ Therefore, the UHF band finally became comparable to VHF thanks in large part to initiatives that enticed broadcast owners to invest in UHF stations.

B. Telecommunications Act of 1996 Sets New Cap and Review

With the passage of the Telecommunications Act of 1996, Congress ended the numerical station limit and increased the audience reach limit to 35% in the interest of deregulation and increased competition.¹⁰⁷ Section 402 of the Act mandated the Commission to review their ownership rules every two years in a process referred to as the “Biennial Review.”¹⁰⁸ In the first Biennial Review in 1998, the Commission decided to “wait and see” how the initial deregulation would affect the industry, and ultimately chose not to raise the cap.¹⁰⁹

¹⁰² 1985 *Multiple Broadcast Ownership Order*, 100 FCC2.d 74, at para. 44 (Feb. 1, 1985).

¹⁰³ Rothenberger, *supra* note 13, at 714 (citing *In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, MM Docket No. 91-221, 10 FCC Rcd 4538, para. 23 (Mar. 7, 1995)).

¹⁰⁴ *In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, MM Docket No. 91-221, 10 FCC Rcd 4538, para. 23 (Mar. 7, 1995) [hereinafter *1995 Television Broadcast Order*] (cited by Rothenberger, *supra* note 13, at 714).

¹⁰⁵ See Rothenberger, *supra* note 13, at 715.

¹⁰⁶ 1995 *Television Broadcast Order*, 10 FCC Rcd 4538, para. 22 (Mar. 7, 1995) (cited by Rothenberger, *supra* note 13 at 714).

¹⁰⁷ Angela J. Campbell, *A Public Interest Perspective on the Impact of the Broadcasting Provisions of the 1996 Act*, 58 FED. COMM. L.J. 455, 465 (2006).

¹⁰⁸ See generally Telecommunications Act of 1996 Pub. L. No. 104–104, 110 Stat. 129 (codified at 47 U.S.C. § 161).

¹⁰⁹ See *UHF Discount Elimination NPRM*, *supra* note 14, at para. 6.

1. Fox Television Stations, Inc. v. FCC: The “Wait & See” Approach is Rejected

Several parties challenged the 1998 Biennial Review and its “wait and see” approach in *Fox Television Stations, Inc. v. FCC*.¹¹⁰ The D.C. Circuit held that the “wait and see” approach used by the Commission in its 1998 Biennial Review violated the agency’s mandate to decide every two years whether or not the National Television Ownership Rule was still necessary.¹¹¹ The court held that the Commission did not provide sufficient evidence to show that there was a need for the rule and did not provide a reason why it backed away from its 1984 decision to begin phasing out the rule when it formerly held that “(1) the rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity.”¹¹² Instead of rejecting the rule all together, however, the court decided to remand the issue back to the Commission in case the evidence for justifying the rule could be presented.¹¹³

2. The 2002 Biennial Review, Prometheus I, and the Consolidated Appropriations Act of 2004

The Commission confronted the issue again in 2002 when it decided to raise the cap to 45%.¹¹⁴ The Commission felt that the national cap was no longer necessary to promote competition and diversity, but was still relevant for protecting localism.¹¹⁵ The Commission cited fears that national networks would consolidate across the country to the detriment of local affiliates.¹¹⁶ Opposition notwithstanding, the Commission felt that there was also a congressional precedent set in the 1996 Communications Act that the cap should be raised by 10% again.¹¹⁷ The FCC reasoned that lifting the cap would allow the networks to slightly grow their number of stations to achieve a better economy of scale,

¹¹⁰ See generally *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); see also *In the Matter of 2002 Biennial Regulatory Review-Review of the Commission’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, MB Docket 02-277, 18 FCC Rcd 13620, paras. 502-03 (July 2, 2003) [hereinafter *2002 Biennial Review Broadcast Ownership Rules*].

¹¹¹ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042, 1044 (D.C. Cir. 2002).

¹¹² *Id.* at 1034, 1042; *2002 Biennial Regulatory Review Broadcast Ownership Rules*, 18 FCC Rcd 13620, para. 506 (July 2, 2003).

¹¹³ *Fox Television Stations, Inc.*, 280 F.3d at 1048-49.

¹¹⁴ *2002 Biennial Review Broadcast Ownership Rules*, 18 FCC Rcd 13620, para. 499.

¹¹⁵ See *Id.* at para. 501.

¹¹⁶ See *Id.*

¹¹⁷ See *Id.* at para. 582.

but made sure they could not reach a larger population than their affiliates collectively.¹¹⁸

The 2002 Biennial Review was challenged in the Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC* when public interest groups challenged the order by arguing “that its deregulatory provisions contravened the Commission’s statutory mandates as well as the Administrative Procedure Act.”¹¹⁹ However, before the court could either affirm or vacate the rule, Congress superseded the court and passed the Consolidated Appropriations Act of 2004 (hereinafter “CAA”).¹²⁰

The CAA statutorily mandated the Commission to set the National Television Ownership rule at 39% as a result of congressional concerns that the Commission went too far in raising the cap to 45%.¹²¹ It also updated Section 202(h) of the Telecommunications Act so that the Commission may only review its rules quadrennially rather than biennially.¹²² Notably, it insulated the National Television Ownership rule from review under Section 202(h) so that it was no longer part of the quadrennial review.¹²³ By doing this, some argue that Congress stripped the Commission of its power to change the National Television Ownership Rule.¹²⁴

The *Prometheus* decision also had a major impact on the UHF Discount because of its interpretation of the CAA.¹²⁵ The court held that the CAA “insulated” the UHF Discount from being decided during the quadrennial ownership.¹²⁶ The court noted that the 2004 CAA “added a sentence to §202h: ‘[t]his subsection does not apply to any rules relating to the 39 percent national audience

¹¹⁸ See *Id.* at para. 582-83.

¹¹⁹ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 381 (3d Cir. 2004).

¹²⁰ See generally Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3.

¹²¹ See CHARLES GOLDFARB, CONG. RESEARCH SERV., RL31925, FCC MEDIA OWNERSHIP RULES: CURRENT STATUS AND ISSUES FOR CONGRESS 13 (2004) available at <http://1.usa.gov/1xpZ1vZ>.

¹²² See generally 118 Stat. 3.

¹²³ See CHARLES GOLDFARB, CONG. RESEARCH SERV., RL31925, FCC MEDIA OWNERSHIP RULES: CURRENT STATUS AND ISSUES FOR CONGRESS 14 (2004) available at <http://1.usa.gov/1xpZ1vZ>.

¹²⁴ *In Re* Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Reply Comments of Common Cause, Free Press, Media Alliance, and Office of Communication, Inc. of the United Church of Christ*, MB Docket No. 13-236, at 4 (Jan. 13, 2014).

¹²⁵ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396-97 (3d Cir. 2004).

¹²⁶ See *id.* at 397 (“Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission’s consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h).”).

limitation.”¹²⁷ The court interpreted this to mean that since the UHF Discount “relates” to the ownership rules, it cannot be considered during a quadrennial review.¹²⁸ However, the court noted that the CAA did not stop the Commission from initiating a rulemaking separate from the quadrennial review where it could decide the future of the UHF Discount.¹²⁹

IV. THE PROPOSED ELIMINATION OF THE DISCOUNT

The entire broadcast industry, arguably, changed once the digital transition occurred in 2009. The historical deficiencies of the UHF band ended,¹³⁰ as the propagation characteristics for UHF channels surpassed those of VHF signals.¹³¹ For example, receiving VHF signals now requires a higher antenna than UHF signals, making them inferior for consumers with indoor antennas.¹³² Further, VHF signals are more prone to interference especially in urban areas with an excess of electrical devices.¹³³ These deficiencies were not a surprise to the Commission, who had predicted this would happen in the years preceding the digital transition.¹³⁴ In fact, the Commission instituted a sunset policy for the UHF Discount provided to network affiliates in the largest fifty markets.¹³⁵

On September 26, 2013, the Commission proposed to eliminate the UHF Discount.¹³⁶ The shorthanded Commission approved the Notice of Proposed Rulemaking by a 2-1 vote.¹³⁷ The Commission proposed, that in the wake of the *Prometheus* decision, it still has the authority to repeal the UHF discount and review the National Television Ownership cap as long as it is out of the scope of the quadrennial review.¹³⁸ The Commission also decided to repeal the discount due to its new-founded technological advantages, but without reconsidering the ownership cap as well.¹³⁹

¹²⁷ *Id.* at 396.

¹²⁸ *Id.* at 397.

¹²⁹ *See id.* at 443. (“The ‘presumption,’ therefore, is that a regulation will be vacated or modified if it does not continue to be in the public interest.”).

¹³⁰ *UHF Discount Elimination NPRM*, *supra* note 14, at para. 1.

¹³¹ *Id.* at para. 12.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* (Commissioner Pai dissenting) (citing *2002 Biennial Review Broadcast Ownership Rules*, *supra* note 110, para. 591 (2003)).

¹³⁵ *See id.* at paras. 8, 16, appendix B para. 2.

¹³⁶ *See id.* at para. 1.

¹³⁷ Eggerton, *supra* note 35.

¹³⁸ *UHF Discount Elimination NPRM*, 28 FCC Rcd 14324 at para. 11, 13.

¹³⁹ *See id.* at para. 16 (Commissioner Pai dissenting), explaining that the Commission did not consider the ownership cap and:

[B]ecause we are proposing to end the UHF discount, we should ask whether it is time

Acting Chairwoman Mignon Clyburn hailed the repeal of the UHF discount as a long overdue decision.¹⁴⁰ She also stated that while a change to the ownership cap was possible in the future, that “[in the meantime] we cannot...ignore the impact the DTV transition has had in the marketplace, changes that everyone must acknowledge currently stand this rule on its head.”¹⁴¹ However, the Commission’s decision has been highly criticized.¹⁴² Commissioner Ajit Pai dissented from the proposal arguing that any decision to repeal the discount should occur with a simultaneous review of the ownership rules.¹⁴³ The broadcast industry echoed his concern.¹⁴⁴ The National Association of Broadcasters stated that a stand-alone repeal of the discount would be “arbitrary and capricious.”¹⁴⁵

V. DISCUSSION

A repeal of the UHF discount would significantly lower the national cap and potentially force broadcasters to divest some of their stations.¹⁴⁶ Therefore, if

to raise the 39 percent cap [...] [t]he Commission has not formally addressed the appropriate level of the national audience cap since its 2002 Biennial Review Order, and it has been nearly a decade since the 39 percent cap was established.

Id.

¹⁴⁰ *Id.* (Statement of Acting Chairwoman Mignon Clyburn).

¹⁴¹ *Id.*

¹⁴² *See, e.g., id.* (Commissioner Pai dissenting) (“Remember what today’s item does. It only *proposes* to eliminate the UHF discount. It does not actually end the UHF discount.” [emphasis in original]); Eggerton, *supra* note 41. (quoting the National Association of Broadcasters, “[r]econsidering the UHF discount on a stand-alone basis will hinder the Commission’s ability to determine whether the proposed change effectuates the purposes of the national television ownership rule.”).

¹⁴³ *UHF Discount Elimination NPRM*, 28 FCC Rcd 14324 (Commissioner Pai dissenting)

[B]ecause we are proposing to end the UHF discount, we should ask whether it is time to raise the 39 percent cap. Indeed, this step is long overdue notwithstanding any change to the UHF discount. The Commission has not formally addressed the appropriate level of the national audience cap since its 2002 Biennial Review Order, and it has been nearly a decade since the 39 percent cap was established.

Id.

¹⁴⁴ *See* Eggerton, *supra* note 41 (“The National Association of Broadcasters Monday told the FCC that it should not consider eliminating the UHF discount without also considering the wider implications of any ownership modification, and that to do so would be “arbitrary and capricious.” That is as much as saying it would be illegal.”).

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g., In re Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc.*, MB Docket No. 13-236, at 27 (Dec. 16, 2013) (available at FCC Electronic Comment Filing System) (“Yet at precisely the time that the capital markets are enabling committed businesses to consider reinvesting billions of dollars in the broadcast

there is a change to the UHF discount, it should only come in conjunction with a holistic review of the National Television Ownership rule in order to ensure that there are no negative effects to broadcast entities. In this new rulemaking, the Commission should consider its past justifications for the cap¹⁴⁷ and evaluate whether or not they are still necessary in today's hypercompetitive media marketplace. Based upon the constantly evolving marketplace of today,¹⁴⁸ further deregulation of broadcast ownership is timely.

A. Despite the Consolidated Appropriations Act of 2004, The Commission Still Has The Authority to Change the National Television Ownership Rule

The time has come for the Commission to review the National Television Ownership Rule. However, some parties believe that Congress stripped the Commission of its authority to change the national ownership rule.¹⁴⁹ These parties argue that with the Consolidated Appropriations Act, Congress set the National Television Ownership Rule at 39% from 35%.¹⁵⁰ Further, they claim that Congress stripped the Commission of its authority to change the cap

industry, the FCC would be throwing up a massive road block and effectively telling investors to direct their money elsewhere.”); *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Sinclair Broadcasting Group, Inc.*, MB Docket No. 13-236, at 12-13 (Dec. 16, 2013)

The FCC's proposal is patently unfair to FCC licensees, who currently do not exceed the 39% Cap and are in the process of or considering acquiring additional stations. The proposal disrupts the settled business expectations and plans of such owners and investors, all of whom have acted in reliance on the current rules in effect at the time they took action (and still in effect now).

Id.

¹⁴⁷ See *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc.*, MB Docket No. 13-236, at 28 (Dec. 16, 2013) (available at FCC Electronic Comment Filing System) (“If the Commission nonetheless proceeds to consider changes at all, it should turn its attention to a more comprehensive analysis of whether a national limitation on broadcast station ownership can possibly withstand scrutiny in light of modern marketplace realities.”).

¹⁴⁸ *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Sinclair Broadcasting Group, Inc.*, MB Docket No. 13-236, at 9 (Dec. 16, 2013) (available at FCC Electronic Comment Filing System).

¹⁴⁹ See *UHF Discount Elimination NPRM*, *supra* note 14 (Commissioner Pai dissenting) (“[O]ne could argue that Congress took away our authority to change the cap in 2004 when it instructed us to increase the national cap to 39 percent.”).

¹⁵⁰ *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc.*, MB Docket No. 13-236, at 7 (Dec. 16, 2013); see *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Sinclair Broadcasting Group, Inc.*, MB Docket No. 13-236, at 4 (Dec. 16, 2013) (“The CAA directed the FCC to set the ownership cap to exactly 39 percent.”).

through Sections 4(i) and 303(r) of the Communications Act and set a new mandate that only Congress can change the cap.¹⁵¹ Some have gone as far to argue that the CAA requires Congress to review the cap whenever there is a change in the media marketplace.¹⁵² However, these arguments rely more on assumptions than strict statutory interpretation.

In the face of any legal challenge over its authority to change the cap, a decision by the Commission would be given *Chevron* deference.¹⁵³ In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, with respect to the statute an agency administers, the Supreme Court stated, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹⁵⁴

First, one could argue that Congress has been clear on the Commission’s authority to change the cap and has not repealed it.¹⁵⁵ Relying on Sections 4(i) and 303(r) of the Communications Act, the Commission has regulated in the area of broadcast ownership for decades and has progressively extended the number of stations a national entity may own.¹⁵⁶ Though Congress superseded the Commission’s 2002 revised ruling that raised the national ownership cap to 45%,¹⁵⁷ it did not go as far as permanently stripping the Commission’s authority to review the National Television Ownership Rule.¹⁵⁸ In fact, there is no language in the Telecommunications Act or the CAA that proves any congressional intent to strip the Commission of its general rulemaking authority over ownership under Sections 4(i) and 303(r).¹⁵⁹ The Telecommunications Act

¹⁵¹ 149 CONG. REC. 32091 (2003) (statement of Rep. W.J. Tauzin) (“[T]his bill will forbid the FCC from raising or lowering the 39 percent limit as market conditions continue to change.”).

¹⁵² *Id.* (statement of Rep. W.J. Tauzin) (“By requiring Congress to act whenever fine-tuning becomes necessary is not only impractical, but it stifles the media marketplace.”).

¹⁵³ *United States v. Mead Corp.*, 533 U.S. 218, 218-19 (2001).

¹⁵⁴ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁵⁵ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (3d Cir. 2004).

¹⁵⁶ 47 U.S.C. § 307(a) (2012); *see id.* § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”); *see also id.* § 303(r)

[T]he Commission...shall...[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Id.

¹⁵⁷ 2002 Biennial Review Broadcast Ownership Rules, *supra* note 110, para. 583.

¹⁵⁸ *Prometheus Radio Project*, 373 F.3d at 397.

¹⁵⁹ *See In re Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, Comments of 21st Century Fox, Inc. and Fox Televi-*

states:

(c) TELEVISION OWNERSHIP LIMITATIONS.—

(1) NATIONAL OWNERSHIP LIMITATIONS.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

[...]

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.¹⁶⁰

Here, the Telecommunications Act mandated the Commission to review several ownership rules biennially.¹⁶¹ However, it never stated that the Commission was stripped of its authority under Sections 4(i) and 303(r).¹⁶² Furthermore, when Congress passed the CAA, it further clarified the Telecommunications Act by stating:

SEC. 629. The Telecommunications Act of 1996 is amended as follows—

(1) in section 202(c)(1)(B) by striking “35 percent” and inserting “39 percent”;

(2) in section 202(c) by adding the following new paragraphs at the end:

“(3) DIVESTITURE.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

“(4) FORBEARANCE.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);”;

(3) in section 202(h) by striking “biennially” and inserting “quadrennially” and by adding the following new flush sentence at the end:

sion Holdings, Inc., MB Docket No. 13-236, at 9 (Dec. 16, 2013) (available via FCC Electronic Comment Filing System) (“If Congress had wanted the FCC to remain free to modify the Cap using its general rulemaking authority, it would have said so.”).

¹⁶⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56, 110-12.

¹⁶¹ *Id.*

¹⁶² *See generally id.* (“The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 [...]).”).

“This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).”¹⁶³

Here, as the Third Circuit noted in the *Prometheus* case, the CAA “amended § 202(h) in two ways: (1) [the court made] the Commission’s biennial review obligation quadrennial; and (2) [the court insulated] from § 202(h) review “rules relating to the 39 percent national audience reach limitation.”¹⁶⁴ As a result, ownership reviews now occur quadrennially and do not include a review of the National Ownership Rule.¹⁶⁵ In the CAA, there is no mention of Sections 4(i) and 303(r), but there was a clear indication of rules that Congress intended to change.¹⁶⁶ Congress clearly mandated a quadrennial review by striking the word “biennially”¹⁶⁷ and stated that rules related to the new 39% national ownership rule should not be reviewed under § 202(h).¹⁶⁸ The fact that neither the Telecommunications Act nor the CAA stripped the Commission of any of its rulemaking authority indicates that Congress did not intend to disturb this function.¹⁶⁹ Furthermore, in opposition to the arguments of a few, the CAA does not include statutory language that indicates Congress must review the National Television Ownership rule whenever the media landscape changes.¹⁷⁰ Also, the fact that Congress has not taken action regarding the future of the cap (despite the ever changing media landscape) provides additional evidence that this responsibility should be left to the FCC.¹⁷¹

Even if a court deems the statute is ambiguous, the Commission could still successfully argue that their construction of the statute is permissible under *Chevron*. Historically, courts have always given deference to agencies when interpreting statutes.¹⁷² The Supreme Court has stated that deference is created

¹⁶³ 118 Stat 3, 99-100.

¹⁶⁴ *Prometheus Radio Project*, 373 F.3d at 389 (citing 118 Stat. 3, 100).

¹⁶⁵ *Id.*

¹⁶⁶ 118 Stat. 3, 99-100.

¹⁶⁷ *Id.* at 100.

¹⁶⁸ *Id.* at 99-100

¹⁶⁹ See *In re* Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc.*, MB Docket No. 13-236, at 9 (Dec. 16, 2013) (available via FCC Electronic Comment Filing System) (“If Congress had wanted the FCC to remain free to modify the Cap using its general rulemaking authority, it would have said so.”).

¹⁷⁰ *Id.* at 4

¹⁷¹ *Contra id.* at 12

[T]he plain text of the Appropriations Act, especially when read in the context of the statutory scheme, confirms that Congress stripped the Commission of authority to modify the Cap and the UHF discount. If there are to be changes to the Cap, or the way that it is calculated going forward, it should be a matter for Congress to decide.

Id.

¹⁷² See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an execu-

when it is necessary to consider the effects of regulations, which depend “upon more than ordinary knowledge respecting the matters subjected to agency regulations.”¹⁷³ Furthermore, the Supreme Court in *Chevron* ruled that an agency decision was permissible if it was a “reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, [and] we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”¹⁷⁴ As a result of *Chevron*, lower courts have increasingly affirmed agency decisions when challenged by parties.¹⁷⁵

The Commission’s use of the rules contained in the present Communications Act cannot be viewed as unreasonable when there has not been an explicit revocation. *Chevron* deference was created for issues where there is a disagreement over statutory interpretation.¹⁷⁶ In this instance, there is a disagreement over how a governing statute (the Telecommunications Act of 1996) has been affected by a subsequent clarifying statute (the Consolidated Appropriations Act).

The Commission is in a position where ambiguity over the statutes has given them “an implicit legislative delegation” as long as its decision is permissible or reasonable.¹⁷⁷ Given these circumstances, a decision to raise the national ownership cap would be permissible for a number of reasons. First, the Commission is using rulemaking authority that has yet to be specifically revoked.¹⁷⁸ Second, the Commission recognizes the effect a repeal of the UHF discount would have without a simultaneous review of the National Ownership Rule.¹⁷⁹ For example, if the Commission chose to repeal the UHF discount, an action

tive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)).

¹⁷⁵ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1121-22 (2008).

Even if *Chevron* has not colonized the entire deference landscape as much as some lawyers and experts believe, it may have marked an important shift in judicial attitudes toward agency interpretations. We cast no doubt on the literature finding that lower court judges frequently defer to agencies under *Chevron* or even *Skidmore* in the post-*Chevron* era, perhaps at heightened rates.

Id.

¹⁷⁶ *Chevron, U.S.A., Inc.*, 467 U.S. at 844.

¹⁷⁷ Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1024 (1990).

¹⁷⁸ *UHF Discount Elimination NPRM*, *supra* note 14 (Commissioner Pai dissenting).

¹⁷⁹ *Id.*

the *Prometheus* decision allowed for,¹⁸⁰ it would result in a major constriction of the national ownership cap,¹⁸¹ which would also undercut congressional intentions in the CAA to set the cap at thirty-nine percent.¹⁸² Since the Commission is a creature of statute,¹⁸³ it is not unreasonable for it to raise the cap through its rulemaking authority so that it does not change the status quo in the broadcast industry. This would prevent a repeal of the UHF discount from being invalidated by a court as “arbitrary and capricious.” Therefore, as long as the Commission can state that its decision to update the National Ownership Cap is reasonable and permissible under the ambiguous statute, it would likely pass judicial muster in light of *Chevron*.

B. Not Considering the UHF Discount and Ownership Rules Simultaneously Is “Arbitrary and Capricious”

The opinions of Commissioner Pai and players in the industry, who believe that the proposed repeal of the UHF discount is arbitrary and capricious, are not misguided.¹⁸⁴ A repeal of the UHF discount is tantamount to drastically lowering the National Television Ownership Rule below its intended thirty-nine percent cap. For decades, entities have been expanding their business portfolio through government initiatives intended to grow the use of UHF channels.¹⁸⁵ To repeal this initiative, despite industry dependence and without a thorough review of the National Television Ownership Rule, is “arbitrary and capricious” under the Administrative Procedure Act.

The Administrative Procedure Act states that, when reviewing an agency action, “[t]he reviewing court shall hold unlawful and set aside any agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁸⁶ The Supreme Court has laid out the standards for what makes an agency action “arbitrary and capricious.”¹⁸⁷ The Supreme Court held there is a requirement that agencies:

Must ordinarily display awareness that it is changing position, and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court’s satisfaction that

¹⁸⁰ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (3d Cir. 2004).

¹⁸¹ *UHF Discount Elimination NPRM*, 28 FCC Rcd 14324 (Commissioner Pai dissenting).

¹⁸² *Id.*

¹⁸³ *Id.* at para. 14.

¹⁸⁴ *Id.* (Commissioner Pai dissenting).

¹⁸⁵ *Id.* at paras. 507.

¹⁸⁶ 5 U.S.C. § 706(2)(a) (2012).

¹⁸⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

the reasons for the new policy are better than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change adequately indicates.¹⁸⁸

In *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court explained that in order to find agency action “arbitrary and capricious” the court must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁸⁹ The Supreme Court further stated, “the agency action is to be set aside if the action was not supported by ‘substantial evidence.’”¹⁹⁰

In this case, a decision to repeal the UHF discount without a review of the National Television Ownership rule is likely to be struck down as “arbitrary and capricious” since it significantly restricts the thirty-nine percent cap, and incorrectly assumes that UHF stations are at a newfound advantage after the digital transition.¹⁹¹

C. A Stand Alone Repeal of the UHF Discount is “Arbitrary and Capricious” Because It Directly Undercuts Congressional Intent by Restricting the Ownership Market

Repealing the UHF Discount would severely restrict the National Ownership Rule well below the thirty-nine percent cap previously set by Congress. Today, the UHF band is finally vibrant after decades of doubt and financial uncertainty.¹⁹² This is largely the result of decades of Commission encouragement¹⁹³ and industry innovation and investment in the band.¹⁹⁴

The Commission used initiatives to encourage and increase ownership of UHF stations over the last several decades so that consumers could have more

¹⁸⁸ *Id.* at 515

¹⁸⁹ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *See also* *AT&T Co. v. FCC*, 974 F.2d 1351, 1354-55 (D.C. Cir. 1992).

¹⁹⁰ *Citizens to Preserve Overton Park*, 401 U.S. at 402.

¹⁹¹ *See UHF Discount Elimination NPRM*, *supra* note 14 (Commissioner Pai dissenting) (“And as today’s item indicates, ‘the DTV transition has borne out the Commission’s expectation.’ Indeed, it now appears that UHF spectrum is more compatible with digital television signals than VHF spectrum. As the Commission has previously stated, ‘the disparity between UHF and VHF channels has if anything been reversed.’”).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, FCC, <http://fcc.us/16pWgiK> (last visited Nov. 4, 2014).

choices in the television market.¹⁹⁵ When the Commission created the UHF discount, it instituted a cap based upon population for the first time.¹⁹⁶ Since then, entities have relied upon the UHF discount and the new cap.¹⁹⁷ The result of this reliance is easily seen. Today, over eighty percent of stations broadcast with UHF signals, which constitutes a significant percentage of entities' portfolios.¹⁹⁸ Recognizing the potential effect of a repeal, Commissioner Pai stated, "[o]ne company that is now more than 19 percentage points under the cap would be only three points below the cap if the UHF discount were eliminated."¹⁹⁹ This is a substantial change for broadcast owners.

The Telecommunications Act of 1996 created a deregulatory framework that would promote competition in the public interest.²⁰⁰ In regards to ownership rules, Congress stated in Section 202(h) that the Commission "shall determine whether any [broadcast ownership] rules are necessary in the public interest as the result of competition" and that the Commission "shall repeal or modify any regulation it determines to be no longer in the public interest."²⁰¹ This means that the Commission should not promulgate rules that would "hinder the transition from a regulated to a competitive marketplace."²⁰²

The repeal of the UHF discount would arguably conflict with the goal of deregulation and, in turn, would force established entities to give up ownership of their stations. Like many other entities, Univision has expressed concern over how the repeal of the discount could negatively affect them.²⁰³ Univision has expanded in reliance of the UHF discount and now owns forty-one stations that reach twenty-two percent of the U.S. population.²⁰⁴ Univision states that a repeal of the discount could cause them to divest as many as ten television sta-

¹⁹⁵ See *id.* at paras. 3-12. These initiatives include and are not limited to: Increasing the National Television Ownership rule, the creation of the UHF discount, and the passage of the All Channel Receiver Act of 1962. *Id.*

¹⁹⁶ 1985 Multiple Broadcast Ownership Order, *supra* note 26, at para. 31.

¹⁹⁷ See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report and Order, MB Docket No. 12-203, 28 FCC Rcd 10496, para. 150 (July 22, 2013) ("At the end of 2012, there were 1,028 commercial UHF stations, 358 commercial VHF stations, 288 noncommercial UHF stations, 107 noncommercial VHF stations.").

¹⁹⁸ *Id.* at para. 150.

¹⁹⁹ *UHF Discount Elimination NPRM*, *supra* note 14 (Commissioner Pai dissenting).

²⁰⁰ *The Public Interest Standard in Television Broadcasting*, U.N. TEX. <http://bit.ly/1GMHPQT> (last visited Sept. 6, 2014).

²⁰¹ Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 Stat. 56, 111-12.

²⁰² *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 544 (2002) (Breyer, J., concurring).

²⁰³ *In re of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, *Comments of Univision*, MB Docket No. 13-236, at 1 (Dec. 16, 2013) (accessible via FCC electronic Comment Filing System).

²⁰⁴ *Id.*

tions and cause a “direct and disruptive impact on Univision and its business.”²⁰⁵

Univision has been a leader in UHF development and the fulfillment of the Commission’s goals of competition, localism, and diversity.²⁰⁶ It offers news, sports, and entertainment in Spanish and is very popular in Hispanic households.²⁰⁷ It presents several news broadcasts and has won many awards for journalism and programming.²⁰⁸ Additionally, Univision’s localism can be seen through its eighty-six local Emmy Awards as well as its proposed expansion to new markets such as Atlanta, Salt Lake City, Houston, Raleigh-Durham, and Philadelphia.²⁰⁹

If the Commission lowers the national cap by repealing the UHF discount, Univision would be forced to divest several of their stations.²¹⁰ As Univision notes, it is very unlikely that new owners would have the same dedication to serving the Hispanic community.²¹¹ As an example, Univision cites an instance when one of its largest affiliate owners declared bankruptcy and five of its former Univision stations became English speaking only.²¹² This change left many cities without a Spanish language station.²¹³ Therefore, the public would be losing innovative and diverse programming by stations tailored to the demographics of their community. This would be contrary to the Commission’s goal of competition, localism, and diversity.

Some entities have operated with the expectation that the current Ownership Rule would not be restricted due to the repeal of the UHF discount and are now in a precarious position since they are very close to the 39% cap.²¹⁴ The Sinclair Broadcast Group, which is acquiring several stations from Albritton

²⁰⁵ *Id.*

²⁰⁶ *See Id.* at 5.

²⁰⁷ *Id.* at 1.

²⁰⁸ *Id.* at 6

Univision News produces an evening news broadcast seven nights a week, a late night news program Monday through Friday, a Sunday morning public affairs show, a daily news magazine, and a daily morning news and entertainment program. Univision News has received a Peabody Award, the Cronkite Award for Excellence in Political Journalism, and two Emmy® Lifetime Achievement Awards.

Id.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 6-7 (“Elimination of the discount, without the relief proposed here, could subject Univision to divestiture of up to 10 television stations in seven markets, including Sacramento, Raleigh-Durham, Salt Lake City and San Antonio.”).

²¹¹ *Id.* at 7.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ David Oxenford, *FCC Starts Proceeding to Consider Abolishing the UHF Discount – Effectively Lowering TV Ownership Limits?*, BROADCAST L. BLOG (Sept. 27, 2013), <http://bit.ly/139AnSM>.

Communications,²¹⁵ would go from a post-approval reach of 21.9% with the UHF Discount to an inflated reach of 38.2% without the discount.²¹⁶ Similarly, once Gannett's acquisition of several Belo stations is complete, its population reach would be roughly 23% with the discount and 30% without it.²¹⁷ Considering the competition in the video marketplace,²¹⁸ this is an extra regulatory burden that contradicts the intent of the Telecommunications Act.

Also, counter to congressional wishes for a deregulatory framework, repealing the UHF discount cuts a national cap that has continued to increase since its creation in 1985.²¹⁹ It specifically would undercut Congress's intention in the CAA to set the cap at 39% by replacing this number with a significantly lower figure.²²⁰ Such a disturbance of the industry and undermining of the statute would likely be considered "arbitrary and capricious" since it stands against the substantial evidence for deregulation.

D. A Stand Alone Repeal of the UHF Discount is "Arbitrary and Capricious" Since UHF Stations Are Still Not Entirely Equal to VHF Stations

The Commission's decision to repeal the UHF Discount without a consideration of raising the cap would be arbitrary and capricious because it incorrectly assumes the digital transition has corrected all previous inequalities of the band. Even though the transition improved UHF broadcasting, it still does not take into account the lasting effects perpetuated by the decades long disparity.

Proponents of repeal believe that the UHF discount only served to correct signal disparity,²²¹ but they fail to remember that it was also an initiative to increase ownership in the UHF band so competition and diversity could be enhanced. For decades, there was not just a signal disparity, but also an economic disparity between VHF and UHF stations.²²² In the Commission's 2003 Ownership Order, it stated that the signal disparity also lead to "lower ratings, less cable and satellite carriage, less network affiliation, and less advertising reve-

²¹⁵ Todd Shields, *Sinclair, Tribune TV Deals Said to See Change From FCC*, BLOOMBERG (Aug. 8, 2013, 17:50:58), <http://bloom.bg/1BV5y3e>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *UHF Discount Elimination NPRM*, *supra* note 14, at para. 3 (see section about history of the National Television Ownership rule).

²²⁰ *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Ion Media Network*, MB Docket No. 13-236, at 4 (Dec. 16, 2013) (accessible via FCC electronic Comment Filing System).

²²¹ *Id.* at 6.

²²² *Id.*

nue for UHF stations.”²²³ The Commission further stated that “even after controlling for factors as programming and market size, UHF stations continue to experience a competitive handicap compared with VHF stations.”²²⁴ Therefore, the Commission has admitted that the UHF Discount was about more than just signal disparity.

These disparities still live on after the digital transition. As Ion Network put it “[i]n reality, four years of signal parity ... is not nearly enough to remedy the economic disparity between UHF and VHF stations that took root and grew for more than 40 years.”²²⁵ Those lost decades for UHF stations were pivotal in developing the television landscape we live in today. In that time, VHF stations “used their commanding market position to build their audiences, reputations, and relationships with national networks and advertisers.”²²⁶ In fact, while VHF stations were superior, the popularity of cable and satellite providers rose,²²⁷ making signal strength irrelevant for reaching an audience. Therefore, the improved UHF signal strength from the digital transition was established too late to properly level the playing field with VHF stations.²²⁸

In their comments, Ion Networks also noted that the 2003 Ownership Order proposed preserving the UHF discount to non-network affiliated UHF stations due to the “economic handicap” that continues to exist.²²⁹ If the Commission wants to repeal the UHF discount without raising the cap, the Commission would have a difficult time proving that these economic disparities no longer affect UHF stations. If the Commission fails to justify its reversal on the issue, a court would likely hold it to be “arbitrary and capricious.”

²²³ *Id.* at 8; see *In the Matter of 2002 Biennial Regulatory Review- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act 1996*, Report and Order and Notice of Proposed Rulemaking, MB Docket 02-277, 18 FCC Rcd. 13620, 13845-47 paras. 586-587 (July 2, 2003) [*2002 Biennial Regulatory Review Broadcast Ownership*].

²²⁴ *2002 Biennial Regulatory Review Broadcast Ownership*, 18 FCC Rcd. 13620, 13846, para. 588.

²²⁵ *In re Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, Comments of Ion Media Network*, MB Docket No. 13-236, at 9-10 (Dec. 16, 2013) (available at FCC Electronic Comment Filing System).

²²⁶ *Id.* at 10.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 7-8, 15.

VI. IT'S TIME FOR THE COMMISSION TO RAISE ITS NATIONAL OWNERSHIP CAP TO REFLECT COMPETITIVE REALITIES OF THE VIDEO MARKETPLACE

As previously stated, the Commission still has the authority through Sections 4(i) and 303(r) of the Communications Act to review the National Television Ownership rule.²³⁰ The Telecommunications Act created a deregulatory framework for the broadcast industry,²³¹ but since its passage, the national cap has only been raised by four percent through the CAA.²³² Considering the rise in unregulated competition from increased MVPD penetration and online video distributors (OVD), broadcasters face a highly competitive industry. The Commission previously stated that competition and diversity were not served by retaining the national cap.²³³ Furthermore, promoting localism, which the Commission found as the sole justification for the National Television Ownership Rule, can be appropriately achieved through less regulatory means. Based upon these facts, reconsidering and raising the cap is the correct decision.

A. The Current National Television Ownership Rule of 39% Is Not Necessary to Promote Competition, Localism, and Diversity

The purpose of the National Television Ownership Rule is to protect competition, diversity, and localism in the media.²³⁴ During the 2002 Biennial Review, however, the Commission stated that the National Television Ownership Rule was not necessary to promote competition and diversity, but was still needed to promote localism in communities.²³⁵ Yet, the Commission held that

²³⁰ 47 U.S.C. § 303(r) (2012).

²³¹ See *McCain Opposes TV Ownership Cap*, COMM. DAILY, Dec. 8, 1994, at 1, available at 1998 WLNR 3880909 (“McCain said that Telecom Act language was supposed to lessen broadcast ownership restrictions, not increase them, and said FCC ‘is ignoring this statutory directive to realistically assess today’s dynamic media marketplace and establish a deregulatory framework that accurately reflects it.’”).

²³² *In re* Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Comments of Ion Media Network*, MB Docket No. 13-236, at 12 (Dec. 16, 2013) (clarifying though the Report and Order for the 2002 Biennial Review raised the cap ten points from 35% to 45%, Congress intervened and set the cap at 39% through the CAA, which is a only a 4% increase).

²³³ *2002 Biennial Review Broadcast Ownership Rules*, *supra* note 110, at 13817, para. 504.

²³⁴ Morse, *supra* note 46, at 365.

²³⁵ *2002 Biennial Review Broadcast Ownership Rules*, 18 FCC Rcd 13620, 13815, para. 501.

We determined that repealing the national TV ownership rule would not harm competition or diversity. Consistent with our decision in 1984, we find that restricting national

localism could still be protected while raising the cap ten-percentage points, to 45%.²³⁶ After ten years with a cap at 39%, it is time for the Commission to review whether localism is served by stations owned by networks and their affiliates. Specifically, the Commission should decide if localism should be balanced with its other goals of diversity and competition so that the cap could be like it was in 2002.

The Commission held in the 2002 Biennial Review that competition and localism did not justify the national cap.²³⁷ In terms of competition, it considered how the cap affected the media marketplace.²³⁸ It held that the cap “restricts the full transition to the least costly way for organizing transactions between television networks and local television stations” by preventing efficient vertical integration.²³⁹ It also held that the cap was not necessary to protect competition in the program acquisition market.²⁴⁰ Furthermore, it held that raising the cap would not negatively affect the market for advertising revenue based upon the measured effect on advertising when the cap was raised ten points in 1996.²⁴¹ In fact, the Commission cited promoting innovation leading into the digital transition as the only justification for maintaining the cap in terms of competition.²⁴² In terms of diversity, the Commission held that the cap has an impact on the number of stations nationwide, but “it has no meaningful impact on viewpoint diversity within local markets.”²⁴³ As a result, the Commission held

station ownership is not necessary to promote either of those policy objectives. We depart, however, from our 1984 decision to repeal the rule because evidence in the record demonstrates that the national television cap serves localism...[W]e continue to believe that to be the case and, consequently, that a national cap is necessary to limit the percentage of television households that broadcast network may reach through the stations it owns...the cap restrains some of the largest group owners – broadcast networks – from serving additional communities with local news and public affairs programming that is of greater quality and at least equal, if not superior, quality than that of affiliates.

Id.

²³⁶ *Id.*

²³⁷ *Id.* at para. 584.

²³⁸ *Id.* at para. 505.

²³⁹ *Id.* at para. 517.

²⁴⁰ *Id.* at para. 523.

²⁴¹ *Id.* at para. 527.

We find, however, that the increase in the cap from 25% to 35% has not harmed national spot advertising revenues. Our analysis of advertising revenue data indicates that despite increases in ownership of stations by CBS, NBC and Fox since 1996, there has been no diminution in the national spot advertising market that can be reliably associated with an increase in network station ownership. With the exception of 2001, national spot advertising has experienced a relatively consistent growth.

Id.

²⁴² *Id.* at para. 532.

²⁴³ *Id.* at para. 535.

that it could not justify the cap in order to support diversity.²⁴⁴

Instead, the Commission held that the cap was still necessary to promote localism.²⁴⁵ The Commission chose to retain the rule since it maintained the “balance of power between the networks and their affiliates, which serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities.”²⁴⁶ According to the Commission, local affiliates were more in touch with their communities and tailored their programming accordingly.²⁴⁷ On the other hand, the Commission felt that network-owned stations would preempt programming far less often due to local concerns about the content.²⁴⁸ Although the Commission held in 2002 that localism was best served by local affiliates,²⁴⁹ they underestimated that dedication to localism already exists because of market pressure. They also failed to consider the benefit of having the necessary resources to appropriately serve local communities.

21st Century Fox (“Fox”) notes that “the Cap has long served to frustrate the localism goal by restricting group owners best able and most willing to serve local communities” and that these communities would be better served by group owners who were willing to invest in local news and programming.²⁵⁰ For example, Fox claims that when it took over the station, it increased the amount of local news by 57% compared to local owners.²⁵¹ Since viewers desire local programming, creating local news and programming is imperative to Fox’s business model. As a result, group owners hire “local managers whose job it is to ensure that their stations serve the needs and interests of the communities they serve.”²⁵² Therefore, the Commission’s goal of localism is not

²⁴⁴ See *id.* at para. 536. The Commission also refuted arguments that the consolidation of stations could hypothetically impact the diversity of investigative journalism and would cause an unfortunate level of uniformity. *Id.* The Commission held that “The national cap cannot be justified by reference to such a hypothetical scenario as this.” *Id.*

²⁴⁵ *Id.* at para. 539.

²⁴⁶ *Id.* at para. 501.

²⁴⁷ See *Id.* at para. 546.

The evidence before us demonstrates both that network affiliates have economic incentives more oriented towards localism than do network-owned stations, and that affiliates act on those incentives in ways that result in networks delivering programming more responsive to their local communities (in the judgment of the affiliate) than they otherwise would.

Id.

²⁴⁸ *Id.* at para. 550.

²⁴⁹ *Id.* at para. 547.

²⁵⁰ *In re* Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Comments of 21st Century Fox*, MB Docket No. 13-236, at 17 (Dec. 16, 2013) (accessible via FCC Electronic Comment Filing System).

²⁵¹ *Id.* at 17.

²⁵² *Id.*

lost on networks and group entities. Accordingly, the Commission should not let localism concerns stop them from either raising or ending the National Television Ownership Rule since competition, diversity, and localism will continue to exist in the future.

B. The National Television Ownership Rule Limits Broadcasters' Ability to Compete in a Very Competitive and Diverse Video Marketplace

Today, the landscape of the media marketplace is much different than it was at the time of the Telecommunications Act of 1996 or the Consolidated Appropriations Act of 2004.²⁵³ The past decade has seen increased penetration from MVPDs and growing use of online video distributors.²⁵⁴ In the 2002 Biennial Review, the Commission's conclusion echoed the D.C. Circuit's opinion in the *Fox* case. Like the court, the Commission held that concerns over diversity and competition did not justify the existing parameters of the National Television Ownership Rule.²⁵⁵ Since then, it has become increasingly clear that the cap may be unnecessary to protect the public interest,²⁵⁶ and broadcasters could benefit from eliminating the ownership cap.

In their comments, the Sinclair Broadcasting Group observed the diversity and competitiveness of the current marketplace, stating:

Pervasive ownership and reach of other media categories can be seen everywhere: the Wall Street Journal and USA Today newspapers are available throughout the nation, not in only 39% of markets; DirecTV and Dish provide direct-to-home video satellite services to every market in the United States; and YouTube, Netflix, and Hulu are household names in the Video-on-Demand Internet market and are available anywhere in the country with a broadband connection. Similarly, Comcast and Time Warner are not constrained by national audience cap limits, and virtually all homes with cable or satellite access are served by CNN, MSNBC, ESPN and numerous other national program services.²⁵⁷

As Sinclair identified, broadcast competitors are generally free from regula-

²⁵³ See *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, MB Docket No. 09-182, (Dec. 11, 2011) (Statement of Comm'r McDowell concurring in part).

²⁵⁴ *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, MB Docket No. 12-203, para. 23, 219 (July 19, 2013).

²⁵⁵ See *2002 Biennial Review Broadcast Ownership Rules*, *supra* note 110, para. 500.

²⁵⁶ Daniel E. Troy, *FCC Completes 1998 Biennial Review of Ownership Rules*, MEDIA INST., <http://bit.ly/1vWDSmc> (last visited Sept. 11, 2014).

²⁵⁷ *In re* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Comments of Sinclair Broadcasting Group*, MB Docket No. 13-236, at 9 (Dec. 16, 2013) (available via the FCC Electronic Comment Filing System).

tion at the national level.²⁵⁸ In a recent case, *Comcast Corp. v. FCC*, the D.C. Circuit held that a cap limiting a cable provider from reaching more than 30% of the population was “arbitrary and capricious” because the Commission could not prove it was necessary to promote competition and diversity.²⁵⁹ For example, while broadcast entities realize strong economies of scale, the cap disproportionately benefits their competitors, who are able to spread their costs over a disaggregated population of content consumers.²⁶⁰

Furthermore, media accessed through the Internet has skyrocketed in the last decade.²⁶¹ The new reality is that consumers receive news and entertainment from countless sources.²⁶² One study showed that Americans watched 50 billion online videos in October 2013 alone.²⁶³ Today, online video distributors like Hulu, Netflix, iTunes, and Amazon Video provide another avenue for consumers to watch content that otherwise would only be seen on Cable or broadcast affiliates.²⁶⁴ The online video provider Hulu, has become a common way to access network programming and as a result, directly competes with network affiliates.²⁶⁵ Furthermore, these online video distributors are investing in the

²⁵⁸ *Id.*

²⁵⁹ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009)

In sum, the Commission has failed to demonstrate that allowing a cable operator to serve more than 30% of all cable subscribers would threaten to reduce either competition or diversity in programming. First, the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.

Id.

²⁶⁰ See David Waterman et al., *The economics of online television: Industry development, aggregation, and “TV Everywhere,”* 37 TELECOMM. POLICY 725, 728 (2013) (“Cable television and other MVPDs evidently realize strong economies of scale with respect to the amount of programming they deliver and the number of subscribers they serve due to high infrastructure costs.”).

²⁶¹ E.g., Robert Levine, *How the Internet Has All But Destroyed the Market for Films, Music, and Newspapers*, *The Guardian* (Aug. 13, 2011, 7:07 PM), <http://bit.ly/13uW8gR>.

²⁶² *Id.*

²⁶³ *In re* Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc.*, MB Docket No. 13-236, at 20 (Dec. 16, 2013) (accessible via FCC Electronic Comment Filing System).

²⁶⁴ *Content*, HULU PLUS, <http://bit.ly/LIVUPD> (last visited Sept. 11, 2014); *Top Charts for Television Shows*, ITUNES, <http://bit.ly/1uVBXzf> (last visited Sept. 11, 2014); *Instant Video*, AMAZON, <http://amzn.to/1nk8n46> (last visited Sept. 11, 2014).

²⁶⁵ See Cecelia Kang, *As Users Flock to iTunes, Hulu and Netflix, TV Stations Struggle to Survive*, *WASH. POST* (Apr. 23, 2012), <http://wapo.st/16pX877> (discussing the shift in viewership to online content).

creation of their own programming.²⁶⁶ For example, Netflix invested over a hundred million dollars to produce the critically acclaimed show *House of Cards* in order to compete with broadcast networks.²⁶⁷ Cisco states that Internet video to TV content doubled in 2013 alone and expects it to increase fourfold by 2018.²⁶⁸ Meanwhile, advertisers have noticed these trends and have invested in online video while diverting money away from broadcasters.²⁶⁹ Furthermore, the ratings of local news, which is the strength of broadcast affiliates, have shown a steadily decrease from 2008 to 2012 with only a small uptick in 2011.²⁷⁰ These signs point to the end of the traditional relationship between local affiliate news and network primetime shows, thus, ending a community bond that was once present when individuals would watch the same evening news and prime-time shows.²⁷¹

Innovations such as Roku and Apple TV, as well as smart phones and tablets, have made it simple to receive this content.²⁷² In fact, the premium cable and satellite network HBO has embraced the moniker “HBO Go,” due to its service that allows customers to access content on multiple devices.²⁷³

Therefore, online video providers are emerging as a true competitor to broadcast, while steady competition remains from MVPDs such as Cable and Satellite. Unlike broadcasters, these competitors are not subject to regulations over what percentage of the population they can reach with their programming.²⁷⁴ This allows them to spread their costs over more consumers as well as

²⁶⁶ April Sperry, *Netflix, Hulu, Amazon Prime Originals: Time To Cancel Your Cable Subscription*, THE HUFFINGTON POST, <http://huff.to/1h16mpZ> (last updated Jan. 25, 2014, 4:01 PM).

²⁶⁷ Julianne Peppitone, *Netflix's \$100 Million Bet On Must-See TV*, CNN MONEY (Feb. 1, 2013, 11:27 AM), <http://cnnmon.ie/139CFkB>.

²⁶⁸ *Cisco Visual Networking Index: Forecast and Methodology, 2013–2018*, CISCO (June 10, 2013), <http://bit.ly/LVhmuL>.

²⁶⁹ Kang, *supra* note 265; but see Liz Shannon Miller, *Hulu, ABC and Local Affiliates: A Strange Secret Threesome*, GIGAOM (Feb. 11, 2011, 3:30 PM), <http://bit.ly/1qXo6vK> (meanwhile, attempts to improve affiliate exposure have been limited).

²⁷⁰ See Project Staff, *Key Indicators in Media & News*, PEW RES. JOURNALISM PROJECT (Mar. 26, 2014), <http://pewrsr.ch/112OcXB>.

²⁷¹ Kang, *supra* note 269.

²⁷² See *HBO Go: Watch HBO Online For Free*, HBO WATCH, <http://bit.ly/1jiecLQ> (last visited Sept. 19, 2014) (“HBO Go is a relatively new app that can be installed on an iPhone, iPad, or Android device and it has just recently been released for Microsoft’s Xbox gaming platform and on Apple devices.”).

²⁷³ *Id.*

²⁷⁴ See *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (discussing that the Commission “has failed to demonstrate that allowing a cable operator to serve more than 30% of all cable subscribers would threaten to reduce either competition or diversity in programming.”).

operate more efficiently.²⁷⁵ Therefore, broadcast could become more competitive by raising the national ownership cap.

VII. CONCLUSION

The D.C. Circuit Court of Appeals is likely to find the repeal of the UHF discount without a simultaneous review of ownership rules “arbitrary and capricious” because it ignores the economic deficiencies UHF stations face and considerably lowers national ownership cap. Instead, the Commission should use its authority to raise or abolish the cap so broadcasters can compete more effectively in a constantly evolving and improving marketplace full of unregulated competitors.

²⁷⁵ See Chris Smith, *Giant Pay TV provider Is Born As Comcast and TWC Confirm \$45B Merger*, BGR (Feb. 13, 2014, 7:25 AM), <http://bit.ly/1we70uA> (discussing Comcast and Time Warner’s merger, which will allow them to operate more efficiently).